

"An underlooked aspect"

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EFFECT OF BRITISH
COLONIZATION ON
PAKISTAN'S LEGAL
SYSTEM

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by
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Preface

This volume will be discussing the effect of British colonization primarily on Pakistan's legal system but before that we need to know about the evolution of common law; as the impact of colonization is on both legal systems' development.

Secondly not only British legislation but the history and politics revolving around legislation making has its marks on the evolution of Pakistani Legal System.

This book will start with the creation of common law, its evolution under Imperial British Rule and then its adaptation by the Pakistan upon independence.

2. Background

The British rule had a lasting Sway on the lives of the Pakistani people. They exploited the **Subcontinental territory** for their own interests and left the land in more disorder and confusion than they found the inhabitants of the land in. Once called "**Golden Sparrow**" by the traders of its time is now a poverty driven land. It is said that during its glorious time it was a land treasured by the emerging powers like France, Britain, Portuguese; which is the very reason that the **British Monarchy** supported the later well-known company **East India Company** for a trade expedition to **Mughal India** then ruled by "**Bad-shah Aurangzeb**". The glorious days of the **Golden Sparrow** were ending and the last blow was delivered by the British monarchy. The reasons for the crushing effects of **post-colonial dilemma** on natives of Pakistan are numerous but the following are the major ones.

The ethnocentric practices of Brits led to shattering of its subjects' confidence and pride in their own ethnicity creating a society, which is, till date xenocentric from its very roots. Secondly, their **agrarian revolution** did not help improve yield and caused landholdings to become more fragmented creating further divide and castes. Thirdly, construction of railways although improved transportation and infrastructure permanently however it was not done keeping the Indian interests but the British interest of boosting in their industrial race with the European powers. Fourthly, though a global system of English education was introduced which led to the downgrading of the local education systems like madrasas', in the long run it also lead to the creation of hierarchy in the educational

institutions' which now in local jargon we refer to as English-Urdu medium divide.

Macaulay's aim was to create a nation of clerks, half westernized, half native, who could economically man the offices of the British Raj. Much of the weakness of the education system still stems from Macaulay's attempts at reform. (Hussein, 1997)

Fifthly, the Indian industry was not protected and many traditional ones were ruined. Moreover, the new political system which lacked personal element was not more effective than the old one.

Perhaps the bitterest legacy of colonial rule is the scar left on the people's psyche. Indians had been used to regard rightly themselves as a highly evolved and intellectual people. British officials treated Indians with undisguised contempt. This treatment was especially offensive to Muslims who for centuries past had been used to receiving special honour and privileges. (Nadia Saleem, Faqiha Rizvi, 2011)

When the British came to India it was in a state of anarchy and hatred for each ethnic group was sprouting, as each kinship fought for imperial power to opportunize the nearing demise of Mughal Empire. In his book, Jawaharlal Nehru comments with his characteristic sarcasm that

"We are often reminded, lest we forget, that the British rescued India from chaos and anarchy" (Nehru, 1961)

Before the British law was implemented, a more personal form of justice existed in the subcontinent. Civilians went to the **durbars** of the ruling classes with their issues and they were settled according to the personal judgment of the ruler. India has a recorded legal history starting from the **Vedic ages** and some sort of **civil law system** may have been in place during the **Bronze Age** and the Indus Valley civilization. The prominent legal systems that existed in the area were, Arian norms, Gupta Empire's

judicial system, Law administered by Sultans of Delhi Sultanate and Mughal Empire. Law was a matter of religious prescriptions and philosophical discourse. Hence had an illustrious history in India. Emanating from the **Vedas**, the **Upanishads** and other religious texts with varying interpretation from Hindu philosophical schools and later by Jains and Buddhists.

Secular law in India varied widely from region to region and from ruler to ruler. Court systems for civil and criminal matters were essential features of many ruling dynasties of ancient India. Excellent **secular court systems** existed under the **Mauryas (321-185 BCE)** and the **Mughals (16th – 19th centuries)** with the latter giving way to the current common law system.

The **English Orientalists** were supportive of adhering surviving Indian law prevailing to a degree in India and revival of '**ancient Indian constitution**', thus components of this law were continuously added into the constitution. Any endeavour to mess with nearby custom would have brought on a hullabaloo and to the English, this was not worth the trouble. **British Imperial Strategy** for India favoured Orientalism as a technique for developing good relations with the natives—until the **1820s** when the influence of "anglicists" such as **Thomas Babington Macaulay** and **John Stuart Mill** led to the promotion of Anglo-centric education.

Along these lines, the legal framework is still in shambles and the credit goes to both the Whiteman and the locals involved in totalitarianism. Regarding the question of the extent of application of British law in India, **Warren Hastings** was in favour of keeping to more local law.

Muslim law of the 18th century was more tolerant and humane than English law. The English were horrified at the Muslim decree of **amputating a thief's hand**, but in England at the time, there were **150 offences punishable by death**. One of the most positive legislations passed by the British is seen as the ban of **Suttee** in India. **Warren Hasting** and **Lord Cornwallis** frequently condemned the rule of the **Mohammedan Criminal Law** exercised by the Mughals and whenever they got any opportunity they introduced changes in it.

3. Common Law

I. Introduction

Law is the system of rules which a particular country or community recognizes for regulating the actions of its members and which it may enforce by the imposition of penalties. Legal system refers to a procedure or process for interpreting and enforcing the law. It elaborates the rights and responsibilities in a variety of ways. Law consists of legally enforceable rules governing relationships among individuals and between individuals and their society.

Common law is **world's oldest practicing law at the moment**. It is based on the principle of "*stare decisis et non quieta movere*" which is Latin for **stand by what has been decided and do not unsettle the settled**, commonly known as the principle of stare decisis. Hence was formed through judicial precedence and jurisprudence of the judges. The English term of jurisprudence is based on the Latin word *jurisprudentia*: where *juris* is the genitive form of *jus* meaning "**law**", and *prudentia* means "**knowledge**". The word was first attested in English in 1628, at a time when the word prudence had the now obsolete meaning of "knowledge of or skill in a matter". In the early 19th century theories by Bentham and Austin got famous because of which Bentham is known as Father of Jurisprudence. He divided his study into two parts, **Expositorial approach** and **Censorial approach**. The word may have come via the French jurisprudence, which was attested earlier in French law. Jurisprudence emerged in **1066 AD** and is still evolving as per the needs of time. Austin's ideology that '**law is the command of the sovereign**' became the basis of English Legal System.

French law has also influenced the evolution of common law because of the influence of French monarchy in Britain (discussed later). Many legal systems were developed because of it and yet many emerged from it. Originally consisted of substantive rights and not procedural remedies which later arose in the system.

The oldest view of jurisprudence dates back to Aristotle which is based on nature's law. *Jefferson's Declaration* assumes "the Laws of Nature." View of Jurisprudence holds that "law is not simply a result of the written law, but a product of the views of judicial decision makers, as well as social, economic, and contextual influences." The Common Law was based largely on traditions, social customs, rules, and cases developed over hundreds of years.

The name is derived from the *medieval theory* that the law administered by the king's courts represented the common custom of the realm, as opposed to the custom of local jurisdiction that was applied in local or manorial courts. The term "common law" is also used to mean the traditional, precedent-based element in the law of any common-law jurisdiction, as opposed to its statutory law or legislation.

In its early development common law was largely a product of three English courts—*King's Bench*, *Exchequer*, and the *Court of Common Pleas*— which competed successfully against other courts for jurisdiction and developed a distinctive body of doctrine.

A standing expository intricacy is that, whereas the United Kingdom is a unitary state in international law, it comprises of three major and other minor legal systems, primarily those of "*England and Wales*", "*Scotland*", and

“Northern Ireland”. Historically, the common-law system in England (applied to Wales since 1536) has directly influenced Irish Legal system but has only partially influenced the distinct legal system in Scotland.

II. Common law's precede

The Normans spoke French and had developed a customary law in Normandy. The locals followed Roman law, Canon law and primarily Anglo-Saxon law.

The Anglo-Saxons, especially after the accession of Alfred the Great (king of the West Saxons (c849–899)), developed a body of rules resembling those being used by the Germanic people of Northern Europe. Anglo-Saxon law along with early Scandinavian law and Germanic law (barbarian law (*leges barbarorum*)), descended from a family of ancient Germanic custom and legal thought. Germanic law was made of customary law codes of the Germans before their contact with the Romans. They are mostly unknown to us except through references of ancient authors and inferences from the codes compiled after Roman invasion.

Under the Anglo-Saxon's England was divided into counties, probably since the ninth century, and severed as administrative units under royal officials 'shire reeves' who were also entrusted with the task of jurisdiction. The shire reeves communicated new law and code to sub-county courts where most of the trials took place.

Local customs governed most matters, while the church played a large part in government. Crimes were treated as wrongs for which compensation was made to the victim. Anglo-Saxon law was active in England from 597AD-1066AD i.e. until Norman Conquest.

Anglo-Saxon initial influence was in the form of Christianity, the practitioners of which brought with them the art of letters, writing, and literacy. It is significant that it was shortly after the arrival of the first evangelical mission in England - led by **Augustine**, and sent by **Pope Gregory I** it is commonly known as **Gregorian Mission of 595 AD** The first Anglo-Saxon law code appeared, issued by **Ethelbert, King of Kent**. The first six pronouncements of this code deal solely with sanctions against molesting the property of the Christian church and its officers, notably demanding twelvefold compensation for stealing from God's house. In contrast, compensation for stealing from the king is set at only nine fold.

Under Anglo-Saxons the country was divided in small kingdoms, each's law written as codes made by their respective knight, baron or local king usually inspired by Roman law. There were hundreds of courts operating below the shire court. The **Shire Court** was primarily responsible for the administration of the kingdom.

Anglo-Saxon law was written in the **vernacular** and was relatively free from Roman influence found in various continental laws written in Latin. Roman influence on Anglo-Saxon law was indirectly exerted through the church. the Viking invasions of the 8th and 9th centuries lead to a definite influence of Scandinavian law on Anglo-Saxon law. After the Norman Conquest Roman law, embodied in Frankish law, influence prominently on the laws of England.

The Norman Conquest did not bring an immediate end to Anglo-Saxon law, but a period of colonial rule by the mainly Norman conquerors produced change. Events began with the **battle of Hastings**, in which the **Anglo-Saxon king Harold II** lost his realm to **William, Duke of Normandy** (later William the conqueror).

Controversy exists regarding the extent to which the efficient government of the **Anglo-Norman realm** was due to the legacy of Anglo- Saxon institutions or to the ruthlessness of the Norman invaders.

Elements of the Anglo-Saxon system that survived in the new jurisprudence, were the **jury** (panel of adjudicators), **ordeals** (trials by physical test or combat), the practice of **outlawry** (putting a person beyond the protection of the law), and **writs** (orders requiring a person to appear before a court) in common law.

III. Under Norman Rule

In **1066 AD** England was conquered by the Normans under their "**Viking King William; The Conqueror**". The Norman king realized that for strong hold there must be a strong legal system to govern England.

Before that England was under rule of Anglo-Saxons and each county head had his own law in his county. Thus to strengthen his rule he developed his own court called "**Curia Regis**" Latin for **King's Court**. Set up in **Westminster Hall** near London which in late 12th century was replaced by **Court of King's Bench** through the "**Bill of Westminster**". Initially the Court of King's Bench travelled along with the king later it merged with the **Court of Common Pleas** and **Exchequer of Pleas**.

King Henry II (1154-89) made important rectifications. **Royal Officials** roamed the country, inquiring about the **Administration of Justice**. Church and state were separated and later developed their own law and legal systems. Later it was realized that one court was not enough for the whole of England. Thus England was divided into several regions called **Circuits**. In each circuit a judge

was appointed. These judges used to tour from one circuit to another per annum, done under “The Assize of Clarendon” 1166 AD sanctioned by King Henry II with the assent of archbishops, bishops, abbots, earls, and barons of England. It established the grand jury system of common law. Jury is derived from Latin word *jurare* meaning to take oath. The mechanisms of this law were first described by Ranulf de Glanvill, (one of the administrators of Henry II) through his manuscript “On the Laws and Customs of the Kingdom of England”. The indictment of criminals under the Assize of Clarendon was a public duty of the judges.

The judges used to decide cases on two bases “common sense” and “custom”. As far as general customs were concerned there was a problem in deciding a case upon them since they were accepted in all over England but local customs caused did cause a problem. Hence to decide that whether or not to base a decision on local customs “four tests” were formed; which needed to be fulfilled in order for the court to favour the custom. They were...

1. The custom must have been practiced since time immemorial
2. The custom must be definite as to time, nature, locality and scope
3. The custom must be reasonable
4. The custom must have been practiced openly and as of right

The judges used to meet annually in “Westminster Abbey” in London, formally titled the Collegiate Church of St. Peter. They used to discuss the cases they had solved in the whole year and set the standards for common law. Judgements were discussed and standardized, to be followed in all related future cases under the concept of “*stare decisis et non quia movere*” which when loosely

translated from Latin means “stand by what has been decided and do not unsettle the settled”.

The judgements selected in to be followed were recorded in a book, known as the **Book of Writs**. Writ evolved from the Anglo-Saxon term **gewrit** which in its earliest form was simply, a written command by the monarch to someone to do something but later evolved into something similar to common law writ.

The concept of stare decisis and writs has now evolved into the doctrine of stare decisis. Thus the foundations of present theory of **Judicial Precedent** were laid down in this way.

Magna Carta and Assizes mainly governed medieval common law. The **Assize of Clarendon** by Henry II in 1166 along with the **Assize of Northampton (1176)** laid foundations for later Assizes. The **Assize of Mort d'ancestor** ("death of ancestor") was an action brought where a plaintiff claimed the defendant had entered upon a freehold belonging to the plaintiff following the death of one of his relatives, founded in 1176 and abolished in 1833.

Magna Carta Liber Tatum (Medieval Latin for "**the Great Charter of the Liberties**"), commonly called Magna Carta, was the first document to curb the powers of monarchy. Also known as “**England's Great Charter of 1215**” subjected the king to the rule of the law and protecting his people from feudal abuse. Magna Carta, had a list of **63 clauses** drawn up to limit King John's power. It was the first time royal authority officially became subject to the law, instead of reigning above it. On **June 15, 1215**, in a field at **Runnymede**, King John affixed his seal to Magna Carta. This charter not only affected the legal make-up of

the empire but also its future politics (discussed in later chapters).

The right to a jury was enshrined in the **Magna Carta of 1215**. Yet, juries were used locally well before then. Juries continued to be constituted by “peers” Juries were asked to judge behaviour based on local custom.

Extraordinary influence in the development of common law and in its dissemination to other parts of the world was the most famous of English jurists, **Sir William Blackstone**. He was born in 1723, entered the bar in 1746, and in 1758 became the first person to lecture on English law at an English university.

In 1297, for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas had five. This powerful and tight-knit judiciary gave rise to a rigid and inflexible system of common law over time. Gradually over time the courts of common law started to get stuck in some issues. The main ones among these are **writs, technicality, and damages**.

The court did not entertain any case which did not fit in any of the existing **writs** after the books of writs was finalised in 15th century. Many new cases could not get a hearing because they were unable to be fitted in a category. The proceedings of the court were done in Latin.

Another cause of dissatisfaction was **technicality** due to which any winning party would lose because of negligible technical error in their presentation to the judge and lose their rightful benefit.

The last was **damages**. This was the only remedy given by common law courts and in many cases were insufficient. The claimants of these civil courts wanted

something more than a mere monetary compensation named damages.

Disappointed litigants consequently turned to the king and the **Privy Council** with petitions for justice. These were referred to the Lord Chancellor who by the end of the 15th century he had begun to build up a series of **equitable remedies**, together with policies governing their operation for the administration of justice.

Magna Carta

When Magna Carta was created, England had endured 16 years of **John's kingship** – a rule based largely on extortion, legal chicanery, blackmail and violence. The Magna Carta was signed in June 1215 between the barons of Medieval England and King John. '**Magna Carta**' is Latin and means "**Great Charter**". The Magna Carta was one of the most important documents of Medieval England. Although nearly a third of the text was deleted or substantially rewritten within ten years, and almost all the clauses have been repealed in modern times, Magna Carta remains a cornerstone of the British constitution. English law in the time of Magna Carta was based on two traditions, one going back to the time before the Norman Conquest of 1066, the other created in the 12th century through equity.

Originally issued by **King John of England (r.1199-1216)** as a practical solution to the political crisis he faced in 1215, Magna Carta established for the first time the principle that everybody, including the king, was subject to the law. Most of the 63 clauses granted by King John dealt with specific grievances relating to his rule. Its 39th clause, gave **all 'free men' the right of a fair trial**. Three clauses from the original Magna Carta still remain on the statute books today. These establish the **liberties of the English Church**

(Clause 1), the privileges of the City of London (Clause 13) and the right to trial by jury (Clauses 39 & 40)

Some of Magna Carta's core principles are echoed in the United States Bill of Rights (1791) and in many other constitutional documents around the world, as well as in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950). During the American Revolution, Magna Carta served to inspire and justify action in liberty's defense. The colonists believed they were entitled to the same rights as Englishmen, rights guaranteed in Magna Carta.

In 1214, a mercenary army raised by King John was defeated by the French at the Battle of Bovines in northern France. This army had been paid largely by the tax known as 'scutage', a payment made to the Crown in place of providing knights for military service, and the focus of much baronial discontent. The king had angered the barons by extracting revenues based on their feudal obligations in order to fight a war in France. After John lost the war, the barons rebelled against the king.

In England, demands for higher taxes to fight the French had made the King unpopular and in October of 1214 King John returned from Normandy to face more opposition. Hubert Walter, the Archbishop of Canterbury, had recently died. It was Hubert Walter who had limited the King's excesses but now that the Archbishop was dead the King was free to do as he pleased.

After Archbishop Hubert Walter's death Stephen Langton, the new Archbishop of Canterbury and many barons of England drew up a new charter for the King to sign. Henry I, John's great-grandfather, had introduced a charter when he became king promising fairer laws for all

English citizens but the promises made in Henry's charter were now being ignored by King John. It was hoped that the King would agree to sign the charter and abide by its promises. In early 1215 the King promised to meet the barons but kept delaying the meeting. This agitated the barons and in the end resulted in the First Baron War 1215-1217.

A group of barons, after finding a copy of **King Henry I's Charter of Liberties**, swore an oath at the **altar of t. Edmunds at Bury St. Edmunds** to force King John to acknowledge their rights on **20th November 1214**. First charter was drafted by the **Archbishop of Canterbury** to make peace between the unpopular King and a group of rebel barons, it promised the protection of church rights, protection for the barons from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown, to be implemented through a council of 25 barons. Neither side stood behind their commitments, thus the charter was annulled by **Pope Innocent III**, leading to the **First Barons' War (1215–17)**.

On 17th may 1215 the rebellious barons marched to London. The gates to London were opened by a supporter of the rebellious Barons and the houses of Jews were targeted for ransacking and burning. The rebels called for those Barons still on the side of John to join them. The Tower of London held by John's supporters was too well defended to fall into the hands of the rebels.

Archbishop Stephen Langton and **William Marshall** attempted to get the Barons and John to meet and find a truce settlement to the civil war on **27th May**. Thus King John had to sign the **Magna Carta** at the start of the war on **15th of June 1215**. A large number of barons, led by **Stephen Langton the archbishop of Canterbury**, meet King John on

an island in the **Thames** at **Runnymede**. They forced the king to sign the '**Great Charter**' or **Magna Carta** that would limit the power of the monarchy. The barons insisted that the old feudal contract should be reinstated and that the king should abide by the laws that the rest of the population did. John agreed to the barons' demand that a committee of twenty-four or twenty-five barons would oversee the decisions he made. Although John signed the document he was soon to find a way to absolve himself from its commitments which prolonged the war. To absolve from the commitments King John approached the Pope through a letter dated **13th September 1215** while King John was at **Dover Castle** John stated that he believed the defence of England was ultimately the responsibility of God and the Pope. King John sought help from Pope Innocent III in his fight against the barons and got the **Pontiff's agreement** that the document was invalid because the king had been forced to sign it. The Pope excommunicated the barons and also served an Interdict on London, forbidding burials to take place. Thus the barons waged civil war with the support of French monarchy.

In October 1215, civil war broke out between King John and his barons. The barons were led by **Robert Fitzwalter** and supported by a French army under the future **Louis VIII** of France. The King raised an army of mercenaries to fight his cause, while the barons renounced their allegiance to him, and invited **Prince Louis (1187-1226)**, son of the King of France, to accept the English crown. Louis invaded England in 1216, and England was still at war when John died of dysentery on the night of **18 October 1216** at **Newark**.

From September of 1215 until March of 1216, King John and his army marched across the east of England

where the rebel barons were in control. John confiscated the rebel barons' lands and gave them to his own supporters. In **October 1215** King John besieged **Rochester Castle** where a garrison of men had been left by the barons on. The garrison was starved out and the castle fell to the King. **21st May 1216** Louis captured Rochester Castle after a short siege. In **January of 1216** King John had reached as far north as **Berwick-upon-Tweed** where he captured the town and set it on fire.

In early 1216 an advance force of French soldiers arrived in England. Prince Louis arrived in England in May and began to advance across the country taking major cities such as Winchester. King John used his castle at **Corfe** on the south coast as his headquarters during this time.

The civil war resulted in French invasion and 16-month occupation of England eventually recalled. Return to *status quo ante bellum* Latin for "the state existing before the war", with some monarchic concessions to the rebellious barons, under the treaty signed by King Henry. King John lost all the territories in France and Normandy when the French barons rose up against his misrule and forced the English out.

After **King John's** death, the regency government of his young son, **Henry III (Henry of Winchester)**, reissued the document in **1216**, stripped of some of its more radical content, in an unsuccessful bid to build political support for their cause. **Cardinal Guala** declared the war against the rebellious barons to be a religious crusade and Henry's forces, led by **William Marshal**, defeated the rebels at the battles of **Lincoln** and **Sandwich** in 1217. At the end of the war in **1217**, the document formed part of the peace treaty agreed at **Lambeth**, where the document acquired the name Magna Carta (1217) with the Seal of Cardinal Guala

affixed on it to distinguish it from the smaller **Charter of the Forest 1217**. Prince Louis resigned his claims to the throne and left England, as confirmation of Magna Carta.

Magna Carta was effectively dead, but it gained new life in the early years of the reign of the next king, Henry III. Henry was just **nine years old** when he succeeded to the throne, and in **November 1216**. He was crowned at the **Abbey Church of Gloucester** by **Peter des Roches** the **Bishop of Winchester**. The **Earl of Pembroke**, **Earl Marshal of England (William Marshal)**, were declared Regent. A revised version of Magna Carta was issued in his name, in order to regain the support of the barons. Another version of Magna Carta was granted in the following year, after the French army had been expelled from England through **Treaty of Kingston** in 1217.

Within a few years, however, Henry had the reforms repealed by the Pope and promised to abide by the **Great Charter of 1225**. The barons asked King Louis IX of France to mediate, but he also sided with Henry leading to the second Barons' War, (1264–67). This revolt was caused by baronial opposition to the costly and inept policies of Henry III. The barons in 1258 had attempted to achieve reform by forcing Henry to abide by the **Provisions of Oxford (1258)**. The second baron war was led by **Simon de Montfort** against the royalist forces of King Henry III, led initially by the king himself and later by his son Prince Edward, the future King Edward I. When, by the **Mise of Amiens (1264)**, the Provisions of Oxford were declared invalid by Louis IX of France, some barons, led by **Simon de Montfort**, took up arms and, in **May 1264**, captured the king at the Battle of Lewes in the south-eastern Downs. From then until his death at the **Battle of Evesham** in August 1265, Simon de Montfort largely controlled England and made important

administrative and parliamentary experiments. A settlement was achieved by the **Dictum of Kenilworth (1266)** and finally by the **Statute of Marlborough (1267)**, which remedied some of the baronial grievances. The war ended in 1267 and the monarchy's powers were restored. De Montfort did not die in vain though. After Henry died in 1272, his son, King Edward I carried out many of de Montfort's reforms.

Jurists such as **Sir Edward Coke** used Magna Carta extensively in the early 17th century, arguing against the divine right of kings propounded by the Stuart monarchs. Both James I and his son Charles I attempted to suppress the discussion of Magna Carta, until the issue was curtailed by the English Civil War of the 1640s and the execution of Charles.

The political myth of Magna Carta and its protection of ancient personal liberties persisted after the **Glorious Revolution of 1688** until well into the 19th century. It influenced the early American colonists in the Thirteen Colonies and the formation of the American Constitution in 1787.

This Charter has a great impact on the formation of tax laws around the world especially in ex-British-colonies. It is this charter that brought forward the concept of **"no taxation without representation"**.

The tax law in Pakistan is primarily drafted upon the guidelines escribed in Magna Carta and in Shariah law.

IV. Evolution of equity law

In the exercise of his equitable jurisdiction, the chancellor initially was not bound by precedent. He exercised with minimum procedural formality. The chancery was relatively cheap, efficient and just. It though posed a threat to **300-year-old common law** since its (equity law's) birth. The Lord Chancellor was a bishop as well as king's advisor. Later the chancellor's court was termed as "**court of equity**" formerly "**Chancery court**" because it worked on the bases of equity i.e. natural justice. From the time of Sir Thomas More, the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law.

Equity developed new remedies to counter the problem of damages. These were

1. **Specific performance**: the contract is enforced by court
2. **Rectification**: the court could alter the contract if both the parties agreed
3. **Recession**: a contract could be dissolved and the parties could go back to their former position
4. **Injunction**: court order to do or not to perform in a prescribed manner
 - a. **Mandatory injunction**: an order to do something i.e. fulfil a right
 - b. **Prohibitory injunction**: an order to refrain or abstain from something or act
 - c. **Interlocutory injunction**: an order to maintain status quo until the case is decided.
 - d. **Perpetual injunction**: permanent and continued enactment of obligation under court order

The **maxims of equity** were also established. They were the basis on which equity worked. The first maxim was

“equity will not suffer a wrong without a remedy” this allowed various equitable remedies to be made. Secondly, “delay defeats equity”, for example in “*Leaf V International Galleries*” the court did not award the remedy of recession since the plaintiff came to the court after a delay of five years. Thirdly, “he who comes to equity must come with clean hands” for example in “*D&C Builders V Rees*” the court ruled in favour of D&C Builders instead of granting *Promissory estoppel* as the Rees had taken unfair advantage of their opponents’ financial crisis and given them a less balance than due as full and final payment. Fourthly, “equity works in *Person-am*”. Fifthly, “equity aids the vigilant”. Lastly, “Equity looks at intention and not form” like in *Berry V Berry* the court accepted their intent and considered their agreement of altering their deed by a contract though formalities don’t allow it.

V. Conflict between equity and common law

Nevertheless, common law and equity continued to have conflicts, until their working were merged by the king in “*Earl of Oxford’s case*”. The main conflict was that common law supported one party and equity court ruled in favour of the other party on appeal. Because of this equity was given superiority by the king over decisions of common law court before they were merged. Thus equity was given appellate status by the monarch.

One of the earliest functions of the *king's chaplain* (the chancellor) and of the chancery (the office that he headed) was to govern access to the royal courts by issuing on application the appropriate original writ. At first the chancellor had great discretion in framing writs, but in time he was limited to a few rigidly circumscribed forms, and in

certain cases worthy claims could not be satisfied. From this inadequacy arose the practice of appealing directly for aid to the chancellor as the "keeper of the king's conscience."

By the early 16th century a fairly well-defined jurisdiction was exercised by the court of chancery in rivalry with the common law. In the 17th century it was definitely established that the Court of Chancery would decide any claim to jurisdiction that the courts of common law disputed.

The early chancellors purported to dispense equity in its original sense of fair dealing, and they cut through the technicalities of common law to give just treatment. Some of their principles were derived from Roman law and from canon law. Soon, however, equity amassed its own body of precedents and tended to rigidity. Both the forms of law were merged formally in one law by the Judicature Act 1873.

Now a single court works under the merged structure containing elements from both common law and equity. Thus in a suit of civil court the claimant can be given damages as of right along with a discretionary equitable remedy.

Many equitable credos are still practiced today including injunctions, promissory estoppel, jury, etc. In promissory estoppel a party gives up their strict legal right in a contract and they cannot go back to the former promise to enforce their right. "Law of Trust" also has its origins to equity which allows us to set up funds for a particular person or set of personals. Other credos have led to the origin of "Statue of Limitations", it sets up time limits for different kinds of cases and lastly, mortgages, which allows one to take a loan of money for legally right purpose stated.

Equity, even in its more limited modern sense, is still distinguished by its original and animating principle that no wrong should be without an adequate remedy.

VI. Common law and equity today

Even today new remedies are developed under equity like “Freezing Order” formerly known as “Mareva Injunction” and “Search Order” formerly known as “Anton Piller Order”. Therefore, equity is still relevant today and is still playing an active role today especially in Statue/Law making.

The concept of original precedent, binding precedent and persuasive precedent show how well equity and common law have merged to form the present day English Legal System. Where precedent is Judgment or decision cited so as to justify a decision in a later, apparently similar case.

VII. Common law elsewhere in the world

Common law is followed as a preceding legal system by many countries especially former British Commonwealth Nations of the colonial era. Like New Zealand, Pakistan, India, Bangladesh, Malaysia and Niagara. All Canada except Quebec and all of the United States except Louisiana follow common law. U.S. state statutes usually provide that the common law, equity, and statutes in effect in England in 1603, the first year of the reign of James I, shall be deemed part of the law of the jurisdiction in America. Later decisions of English courts have only persuasive authority in American courts.

The main alternative to the common law system is the **Civil Legal System (Romano-Germanic law)**, which is used in Continental Europe, and most of the rest of the world. Which is based on **Roman Legal System** and follows the core principles known as codes. Codifications date back millennia, with one early example being the **Babylonian Codex Hammurabi**. Modern civil law systems essentially derive from the legal practice of the **6th-century Eastern Roman Empire** whose texts were rediscovered by late medieval Western Europe. In the 19th century, both France, with the Code Civil, and Germany, with the **Bürgerliches Gesetzbuch**, modernised their legal codes. Both these codes influenced heavily not only the law systems of the countries in continental Europe (e.g. Greece), but also the Japanese and Korean legal traditions.

The contrast between civil law and common law legal systems has become increasingly blurred, with the growing importance of jurisprudence. The main civil law systems in the world are "**French Civil Law**", "**German Civil Law**", "**Scandinavian Civil Law**", "**Italian Civil Law**", "**Swiss Civil Law**" and "**Chinese Civil Law**".

The civil code of the Republic of Turkey is a slightly modified version of the **Swiss Civil code**, adopted in 1926 during **Mustafa Kemal Atatürk's** presidency as part of the government's progressive reforms and secularization.

The next alternative is **Religious law**, in which primarily "**Shariah Law**". Religious law refers to the notion of a religious system or document being used as a legal source, though the methodology used varies. For example, the use of Jewish code of conduct and **Halakha** for public law has a static and unalterable quality, precluding amendment through legislative acts of government or development through judicial precedent. Christian Canon

law is more similar to civil law in its use of codes; and Islamic Shariah law (and **Fiqh jurisprudence**) is based on legal precedent and reasoning by analogy (**Qiyas**), and is thus considered similar to common law. Until the 18th century, Sharia law was practiced throughout the Muslim world in a non-codified form, with the Ottoman Empire's **Mecelle code** in the 19th century being first attempt at codifying elements of Sharia law. Since the mid-1940s, efforts have been made, in various Muslim states, to bring Sharia law more into line with modern conditions and conceptions. In modern times, the legal systems of many Muslim countries draw upon both civil and common law traditions as well as Islamic law and custom. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognise Islam as the religion of the state, obliging legislature to adhere to Sharia. Saudi Arabia recognises Quran as its constitution, and is governed on the basis of Islamic law. Iran has also witnessed a reiteration of Islamic law into its legal system after 1979.

A new phenomenon has risen of **Hybrid Law** which contain elements of various legal systems is practiced now in majority of the countries.

VIII. Other laws merged in English Legal System

Present day English Legal System is affected by international laws predominantly of European Union.

European Union is an organization formed by some European countries that cater for economic, political, military and other common factors affecting the member states. **European Union law** was initially referred to as **European Community Law**. EU law is a body of court

judgments, treaties and law which acts together with other legal systems in the European Union member states. The law is highly respected in the member countries and in case of conflict whether economic, political or those involving human rights, the law is given priority over the national law in the member countries. EU law is generally categorized into three categories namely; **primary law, secondary law and supplementary law.**

According to the **European Act of 1972**, enforceable from 1st January 1973 **United Kingdom** added new sources of law. However, unlike other member countries, these sources of law are concerned with areas that the European Union has concerns in. These areas include agriculture, companies, fishing, competition, free movement of goods and workers, consumer policy, education, health and environment because of EU law the supreme most appellate court in **English Civil Law** is now **European Court of Justice (ECJ)** in **Luxembourg**, and **European Court of Human Rights (ECHR)** in **Strasbourg, France**.

Under **Article 177 of the Treaty of Rome**, the European Court is the supreme tribunal for the interpretation of European Community law. **Section 3 of the European Communities Act 1972** states that questions as to the validity, meaning or effect of Community legislation are to be decided in accordance with the principles laid down by the European Court. In the light of these provisions, **Lord Denning** stated that when interpreting European law, English courts should take the same approach as the European Court would (Gillespie 2007).

3. British India's Legal System

The year 1608 marked the first British contact with India as the newly chartered yet powerful **British East India Company (BEIC)** established its first trading route with the subcontinent at the port city of Surat. The **East India Company** was granted charter by **King George I** in **1726** to establish "**Mayor's Courts**" in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively) which marks the introduction of Common Law in India. At this point Common law applied only to English citizens and those charged by English citizens in common law courts. The first three established courts in India were created at the order of the British parliament to correct and control Company abuses in their Indian facilities.

Judicial functions of the company expanded substantially after its victory in Battle of **Plessey** and by **1772** company's courts expanded out from the three major cities into the lands being annexed by the British army.

Following the **First War of Independence** in **1857**, the control of East India Company's territories in India passed to the British Crown. Resulting in a massive change in the Indian legal system. **Supreme courts** were established replacing the existing **mayoral courts**.

During the **British Raj**, the **Privy Council** acted as the highest '**court of appeal**'. Cases before the council were adjudicated by the Lords of the '**House of Lords**'. The state sued and was sued in the name of the "**British sovereign in her capacity as Empress of India**". The search for a formal code in regulation and adjudication followed the introduction of a more secure rule of private property in India.

The **doctrine of precedent** which is deep rooted in English Law, was first introduced in India in **1726**, when the Mayor's Court were established. Under **Lord North** the Regulating Act 1773 regularized the management practices of EIC in India. The act's long title said: *"for the better Management of the Affairs of the East India Company, as well in India as in Europe"*

During **1790-93 Cornwallis** introduced certain changes in criminal law which were regularised by a **Parliamentary Act of 1797**. Cornwallis, the Governor General of Bengal succeeding Hastings, introduced the **Zamindari system** there in **1793** which was called Permanent Settlement. Under **Lord Cornwallis** for the administration of civil justice there were the civil courts known as **Diwani Adalats** Cornwallis placed them under **collectors** who were given judicial powers. In addition, a court to try cases up to the value of Rs. 200 (of that time) was established presided by an Indian Registrar. At the time of Cornwallis there were English Magistrates who, however, had no power of punishment, but only that of apprehending the criminal, punishment being the function of **Faujdari Adalats** (Criminal Court) which were presided over by Indian judges' apex by **Sadar Nizamat Adalat** (appellate court) presided over by **Mohammad Raza Khan**. So he replaced the system with European Judges with defined powers. Mohammad Raza Khan was removed and his place was taken by the Governor-General and members of the Supreme Council assisted by Indian advisers, and the court was removed from **Murshidabad** to **Calcutta**. The Law to be administered was Muslim law in criminal cases and the personal law of the parties in civil cases, supplemented by the ideas of English law. Often there was a conflict between the two and English law was given supremacy.

Initially only whitemen were allowed to take part in the legal proceedings in the court but was later relaxed allowing the locals to solicit cases in the local courts as well through “Legal Practitioners Act of 1846”. The Mayors’ courts were converted to the High Courts through letters of patents authorized by the Indian High Courts Act 1862 passed by the British parliament. Which introduced the system of trial courts in the land as well similar to that present in England. Thus gradually English Legal System was enforced in British India.

In Harrington’s Analysis of the Bengal Regulations, he states that it became like a patchwork quilt. Regulation VI of 18 of 1832 marked the end the Mohammedan Criminal Law which was not completely set aside till the penal code of 1860 and the Criminal procedure code of 1861 were enacted and the final blow was given by Indian Evidence Act 1872. The English Law, was gradually enforced to the limit it suited Indian Conditions, usage and customs. Thus was systematically imported into India under the British Raj. Under the notion of British parliament and in stewardship of Lord Macaulay. Which was *“Uniformity where it was possible, diversity where it was necessary but in all cases certainty”*. English Law was imported into India through the four Law Commissions.

Under the first Law Commission headed by Thomas Babington Macaulay the Indian Penal Code was drafted and enforced in 1862. Later Contracts Act 1872, Evidence Act 1872, Code of Criminal Procedure 1898 and Code of Civil Procedure 1908, were also enforced by the commission in British India.

In the scope of criminal law, the East India Company continued with use of Islamic law with exception of Bombay Presidency where Hindu law was in practice in pre-colonial

India. Thus, the Company apparently let Indians possession of their laws, and concurrently replaced some with English law that appeared to be both unjust as well as impolitic. The result was that the Indians enjoyed their own laws, but so cleansed and improved by the British who abolished those elements which were contrary to humanity, reason, and justice and similarized it more closely to the English law than the old Indian law. Thus, to quote **Bernard Cohn**,

“What had started with Warren Hastings and Sir William Jones as a search for the “ancient Indian constitution” ended up with what they had so much wanted to avoid – with English law as the law of India”

In **1864**, there was a major reform of the judicial system. The reform abolished the Hindu and Muslim law officers in the various courts of India. The codification of law and consolidation of the court system was further intensified in the quarter century after the takeover of India by the Crown. While the law applied in the courts before 1860 was extremely varied by 1882 *“there was virtually complete codification of all fields of commercial, criminal and procedural law”* except the personal laws of Hindus and Muslims.

However, it must be noted that during British colonialism all parts of India were not under the direct rule of the British. During British colonial rule there were in fact two India: The British India and the princely India. The later, consisting of a third of the Indian subcontinent, were ruled by the native princes and constituted a relatively autonomous domain. In these princely states sometimes progressive legislations were introduced especially in the domains of family and personal laws. During colonialism Hindus and Muslims were governed by their respective personal laws which were gender-biased and

discriminatory towards women but British rulers did not want to interfere in these personal laws. But rulers of princely states undertook some steps to redress such gender-oppressive personal laws.

4. Pakistan's Legal System

The Law of Pakistan is the law and legal system existing in the Islamic Republic of Pakistan. Pakistani law is based upon the legal system of British India thus has its roots to English Legal System. Presently it is a hybrid of **Common Law** (English Legal System) and **Sharia**. Therefore, there are both the appellate courts and trial courts in Pakistan for civil and criminal law cases.

In the sphere of administration of justice, the system of trial, the legal profession, the independence of judiciary, system of judicial precedents and justice according to law, are all based on the principles of Common Law and Equity.

Therefore, for laws that are not governed by Sharia framework judicial framework is based on precedence and cases of Common Law serve as precedent in Pakistan's courts. Sharia was added to the constitution through **statutes** by **Zia-Ul-Haq**. A statute is a formal written enactment of a legislative authority that governs a state, city or country.

Under the "**Government of India Act 1935**" Common Law was adopted in Pakistan upon independence. Therefore for matters involving company law, tort, property law, trust etc. common law is followed in Pakistan. Broadly speaking the constitution which is the main source of the law is also based upon the principles of British unwritten constitution, Democratic value and parliamentary system of government as the paramount importance in it. On independence, the Government of India Act 1935 was retained as a provisional constitution. The legal and judicial system of the British period continued with modifications. The Lahore High Court

and the Sindh Chief Court continued to function. Similarly, the courts of the **Judicial Commissioner** in NWFP (KP) and Baluchistan continued to serve their purpose. A High Court was set up at Dhaka. A new Federal court of Pakistan was also established. The powers, authority and jurisdiction of the federal and high courts remained intact as prescribed under the Government of India Act 1935. The constitutions of 1956, 1962 & 1973 did not drastically alter the judicial structure or the powers and jurisdiction of the superior courts. Only, the Federal Court was renamed as the Supreme Court by the 1956 constitution. The 1973 constitution upgraded the Chief Court of NWFP and the Judicial Commission court of Pakistan into full-fledged High Courts.

During the Zia's regime a new article was added in the constitution of Islamic republic of Pakistan that all the Laws enforced in the country are to be made inconformity with the Islamic Injunctions' based upon the Quran and Sunna. The superior judiciary has the legal power to strike down the whole law or its clauses which are repugnant to Islamic values and injunctions of Quran. The present legal system exercises through the Federal Sharia Courts, as a result of this exercise now the legal structure although basically remains on the foundation of the British legal system yet has characteristics of Principles of Islam.

Court system

Court system of Pakistan is made up of many courts differing in levels of legal superiority and separated by jurisdiction. Some of the courts are federal in nature while others are provincial.

The Supreme Court is the uppermost apex court in Pakistan's judicial hierarchy, the final arbiter of legal and

constitutional disputes. It has Original jurisdiction in inter-governmental disputes between federal and provincial government or among provincial governments, Appellate jurisdiction against judgments of Federal Sharia Court, Service Tribunals and some special courts. The Supreme Court is made up of **17 permanent judges**, and has a permanent seat in Islamabad. Cases are also heard in its **Branch Registries** in the provincial capitals of Lahore, Peshawar, Quetta and Karachi. It has a number of *de jure* powers which are outlined in the Constitution, including appellate and constitutional jurisdiction, and *suo-moto power* for trial on Human Rights matters.

The Supreme Court Judges are supervised by the Supreme Judicial Council, which may hear complaints brought against any of them.

The Supreme Court also has a Sharia Appellate Bench empowered to review the decisions of the **Federal Sharia Court (FSC)**. The Federal Sharia Court of Pakistan consists of **Eight Muslim judges** including the Chief Justice. These Judges are appointed by the President of Pakistan, after decision is made by the **Judicial Committee** consisting the Chief Justice of Sharia Court (Federal Sharia Court) and the Chief Justice of Pakistan. They choose from amongst the serving or retired judges of the Supreme Court or a High Court or from amongst persons possessing the qualifications of judges of a High Court. Of the **8 judges, 3 are required to be Islamic Scholars (Ulema)** who are well versed in Islamic Law. The judges hold office for a period of 3 years, which may eventually be extended by the President.

The **Federal Sharia Court of Pakistan** was established by presidential order in **1980** with the intent to scrutinise all laws in the country that are against Islamic values. Created

as an Islamisation measure and protected under the **8th Amendment** this court has a remit to examine any law that may be repugnant to the "**injunctions of Islam, as laid down in the Holy Quran and the Sunnah.**" If a law is found to be 'repugnant', the Court is to provide notice to the level of government concerned specifying the reasons for its decision. The court also has jurisdiction to examine any decisions of any criminal court relating to the application of Islamic (hudud) penalties. The FSC, on its own motion or through petition by a citizen or a government (federal or provincial), has the power to examine and determine as to whether or not a certain provision of law is repugnant to the injunctions of Islam. Appeal against its decisions lie to the Sharia Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and 2 Ulema, appointed by the President. The court also exercises revisional jurisdiction over the criminal courts, deciding Hudud cases. The decisions of the court are binding on the High Courts as well as subordinate judiciary.

There is one **High Court** in each Province, and one in the federal capital, Islamabad. The High Courts are the appellate courts for all civil and criminal cases in each respective province. Supervises and controls all the courts subordinate to it. The High Courts' general authority is laid out in the **Constitution of Pakistan, 1956, Article 170**, which reads:

"Notwithstanding anything contained in Article 22, each High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and

certiorari, for the enforcement of any of the rights conferred by Part II and for any other purpose.”

Then are subordinate courts for civil and criminal division. Civil Courts consist of District Judge, Additional District judge, Senior Civil Judge and Civil Judge Class I, II, III. Appeal against the decisions of the civil judge lies to the district judge and high court--- depending upon the value of suit.

Criminal courts comprises: Session Judge, Additional Session Judge and Judicial Magistrate Class I, II, III. Appeals against criminal courts lie to session judge or high court depending upon the quantum of penalty.

District courts exist in every district of each province, and have civil and criminal jurisdiction. In each District Headquarters, there are numerous Additional District & Session Judges who usually preside the courts. District & Sessions Judge has executive and judicial power all over the district under his jurisdiction.

The **Sessions court** is also a trial court for major criminal offence and appellate court for summary conviction offences and civil suits of lesser value. Each Town and city now has a court of Additional District & Sessions judge, which possess the equal authority under jurisdiction. When hearing criminal cases, it is called the Sessions Court, and when it hears civil cases, the District Court. Cases are usually allotted by administrative orders of District and Sessions Judges. The Court of the District & Sessions Judge usually hears administrative applications against lower courts orders.

The lowest court is **Magistrates' court**. A Magistrate with the powers of **section 30 of Criminal Procedure Code (Cr.P.C.)** has the jurisdiction to hear all criminal matters

other than those which carry the death penalty but may only pass a sentence of up to seven years' imprisonment. If the court thinks accused deserves more punishment than seven years in jail, then it has to refer the matter to a higher court, with its recommendations to that effect. Every Magistrates' Court is allocated a local jurisdiction, usually encompassing one or more Police Stations in the area. Trial of all non-bail-able offences, including police remand notices, accused discharges, arrest and search warrants, and bail applications, are heard and decided by Magistrate Courts. Magistrates may hear civil suits as well. If they do so, they are usually called a **Civil-Judge-Cum-Judicial-Magistrate**.

A **system of tribunals** also runs parallel to the lower courts for special areas like in United Kingdom. They are created under Special Laws and enactments. There are numerous special tribunals such as;

- Banking Courts
- Services Tribunals
- Income Tax Tribunals
- Anti-Corruption Courts
- Anti-Narcotics Courts
- Anti-terrorist Courts
- Labour Relations Court
- Board of Revenue.
- Special Magistrate courts
- Consumer Courts
- Income Tax Appellate Tribunal
- Environment Appellate Tribunal
- Insurance Appellate Tribunal

The judicial officers have right of approaching the Provincial Judicial Service Tribunal (headed by the judges of the High Court) for redress of their grievances.

In the famous case of **Al-Jehad Trust** the Supreme Court clarified the procedure and qualification for appointment of judges to the Supreme and High Courts and their Chief Justices.

The “**West Pakistan Family Courts Act 1964**” governs the jurisdiction of Family Courts. These courts have exclusive jurisdiction over matters relating to personal status. Appeals from the Family Courts lie with the High Court only. Every town and city has court of family judge. In some areas, where it is only Family Court but in most areas Civil Judge Courts have been granted the powers of Family Court Judges. Under the **Juvenile Justice System Act 2018** Magistrates can hear Juvenile cases as well. The “**Qanoon-e-Shahadat Order 1984**” prescribes the competency of witnesses where examination, evidence and procedure for presenting the same.

The **Special Courts** follow the procedure prescribed in the above codes (**Code of Civil Procedure 1908** and **The Code of Criminal Procedure**). The **Code of Civil Procedure 1908** prescribes for proceeding in civil cases. The Code of Civil Procedure prescribes detail procedure regarding filing of suite, pleading, proceedings, writing of judgment and executing of decrees. The **Code of Criminal Procedure, 1898** prescribes the criminal procedure. Which were made under British rule. Distinction between civil wrongs and crimes relates to legal consequences. Administered according to its own and separate set of forms; in the legal consequences of acts. Objective of civil proceedings is to enforce rights and object of criminal proceedings is to punish wrongs. But, sometimes civil and criminal proceedings may have a similar result in some cases.

Source of law in Pakistan

Sources of law several factors of law have contributed to the development of law. These factors are regarded as the sources of law.

Precedent: the judgements passed by some of the learned jurists became another significant source of law. When there is no legislature on particular point which arises in changing conditions, the judges depend on their own sense of right and wrong and decide the disputes. Such decisions become authority or guide for subsequent cases of a similar nature and they are called precedents. The dictionary of English law defines a judicial precedent as a judgement or decision of a court of law cited as an authority for deciding a similar state of fact in the same manner or on the same principle or by analogy. Precedent is more flexible than legislation and custom. It is always ready to be used.

Custom: is a rule which in a particular family or in a particular district or in a particular section, Class or tribe, has from long usage obtained the force of law. The dictionary of English law defines custom as a law not written, which being established by long use and consent of our ancestors has been and daily is put into practice. Custom as a source of law got recognition since the emergence of **Savigny** (*Friedrich Carl von Savigny*) on the horizon of jurisprudence. It is an exemption to the ordinary law of the land, and every custom is limited in its application.

Legislation is that source of law which consist in the declaration of legal rules by a competent authority. Legislature is the direct source of law. Legislature frames new laws amends the old laws and cancels the existing in all countries. In modern times this is the most important

source of law making. The term **legislature** means any form of law making. Its scope has now been restricted to a particular form of law making. It not only creates new rules of law it also sweeps away existing inconvenient rules.

Statutory Interpretation is a very important function of the court, the process of ascertaining the meaning of letters and expressions by the court is either interpretation or construction. Interpretation is the process of which the court seeks to ascertain the **Meaning** of a particular legislature. It is through interpretation, the judiciary evolves the law and brings the changes in it and thus keeps the law abreast of law.

The following writs are also exercised in Pakistan legal system:

1. **Habeas corpus:**
2. **Mandamus:**
3. **Prohibition:**
4. **Quo warranto:**
5. **Certiorari:**

Laws in Pakistan

5. Business Law

After independence Pakistan inherited its mercantile law from the British empire under the “**Government of India Act 1935**”. Business law, also called commercial law, company law or mercantile law; is the body of rules, whether by convention, agreement, or national or international legislation; governing the dealings between persons and/or entities in commercial matters.

Business law falls into two distinctive areas:

1. the regulation of commercial entities by the laws of company, partnership, agency, and bankruptcy
2. the regulation of commercial transactions by the laws of contract, tort and related fields

Business law encompasses the law governing contracts, sales, commercial paper, agency and employment law, business organizations, property, and bailments. Other popular areas include insurance, wills, estate planning, and consumer and creditor protection. Business law may include issues such as starting, selling, or buying a small business, managing a business, dealing with employees, or dealing with contracts, among others.

Companies Act 1913 was adopted in Pakistan upon independence under the **Government of India Act 1935**. Administered by Provinces till 1973 and then taken over by Federal Government in 1973 constitution. Now it is administered under **Companies Ordinance of 1984**.

Initially the **Sale of Goods Act, 1930** was part of the Contract **Act 1872 (Chapter VII Sections 76 to 123)**. This Chapter VII was repealed and a new law **Sale of Goods Act 1930** promulgated. Pakistan adopted it in August 1947 and is still enforced today. For cash equivalents **Negotiable instruments 1881** was adopted from British constitution and is even exercised today. It Deals with the promissory notice, bills of exchange and cheques. The enactment extends to the whole of Pakistan but it does not affect the provision of **Sec 24 and 35 of the State Bank of Pakistan Act, 1956** and accordingly every negotiable instrument shall be governed by the provisions of this Act. The State Bank of Pakistan has the sole right to issue Bank Notes. The currency notes of the Government of Pakistan supplied to the Bank by the Government may be issued by it for a period which shall be fixed by the Federal Government on the recommendations of the Central Board of State Bank of Pakistan.

Business law internationally

Business law makes us aware of the legal issues involved in law and business. Broadly speaking Business law applies to the rights, relations and conduct of persons and businesses engaged in commerce, merchandising, trade, and sales. In recent years this body of law has been codified in the Uniform Commercial Code (UCC), which has been almost universally adopted.

The **Uniform Commercial Code (UCC)**, which governs sales and commercial paper, has been adopted in some form by almost all states. There are agencies at the state and at federal level which administer the law in such issues such as employment affairs and consumer and credit protection. The laws aim to protect fair business practices and due process to protect rights for aggrieved workers and others.

There are different types of legitimate business substances going from the sole merchant, who alone bears the hazard and duty of maintaining a business, taking the benefits, however in that capacity not shaping any relationship in law and in this way not controlled by exceptional guidelines of law, to the enlisted organization with restricted risk and to multinational companies. In a partnership, members "associate," forming collectively an association in which they all participate in management and sharing profits, bearing the liability for the firm's debts and being sued jointly and severally in relation to the firm's contracts or tortious acts.

All partners are agents for each other and as such are in a fiduciary relationship with one another. It is inevitable that in certain circumstances business entities might be unable to perform their financial obligations.

With the development of the laws surrounding commercial enterprises, a body of rules developed relating bankruptcy: when a person or company is insolvent (i.e., unable to pay debts as and when they fall due), either he or his creditors may petition the court to take over the administration of his estate and its distribution among creditors. Three principles emerge: to secure fair and equal distribution of available property among the creditors, to

free the debtor from his debts, and to enquire into the reasons for his insolvency.

Law is a fundamental business discipline. Its study allows to develop a wider perspective on both the business and regulatory landscape and specialised expertise that will not only enrich our business career but will also lay the foundations for successful comprehension of the business environment.

Business law touches everyday lives through every contractual dealing undertaken. A contract, usually in the form of a commercial bargain involves some form of exchange of goods or services for a price, is a legally binding agreement made by two or more persons, enforceable by the courts. They may be written or oral, to be a binding contract the following must exist: an offer and unqualified acceptance thereof, intention to create legal relations, valuable consideration, and genuine consent (i.e., an absence of fraud). The terms used must be legal, certain, and possible of performance.

Contractual relations, as the cornerstone of all commercial transactions, have resulted in the development of specific bodies of law within the scope of business law regulating

1. **sale of goods**—i.e., implied terms and conditions, the effects of performance, and breach of such contracts and remedies available to the parties;
2. **the carriage of goods**, including both national and international rules governing insurance, bills of lading, charter parties, and arbitrations;
3. **consumer credit agreements**; and

4. **Labour relations** determining contractual rights and obligations between employers and employees and the regulation of trade unions.

Business law, on national and international levels, is continually evolving with new areas of law developing in relation to consumer protection, competition, and computers and the Internet. Business law study is crucial to all business careers, whether in accounting, finance, management, HR, marketing, property, or entrepreneurship. Business Law complements other business majors as well. For example, accounting and finance students will be enriched regarding law governing financial markets and investments, marketing students can find it useful to learn about marketing law and intellectual property law.

Studying Business law will give you an array of skills that are valued highly in business world. It will develop our analytical and critical thinking skills, improve our written communication skills, and help to think strategically about business opportunities and business risks.

6. Contract Law

Contract law deals with, among other things, the formation and keeping of promises. Like other types of law, contract law reflects social values, interests, and expectations at a given point in time e.g. what kind of promises should be legally binding, what excuses are accepted for breaking promises, legally void or invalid. Contract law is designed to provide stability for both buyers and sellers. In Pakistan contract law is based on **Contract Act of 1872**.

Partnership contracts are governed by **Partnership Act of 1932**. Originally it was contained in and formed part of the **Contract Act 1872 (Chap. XI)** which was repealed and in its place was passed a comprehensive law. It is the law governing regulation of partnerships in Pakistan. Law passed by the **Indian Legislature in 1932**. The **Governor General of India** gave assent on **April 8, 1932**. Thus Contract and partnership law have been inherited from English Legal System in Pakistan's Legal System.

7. Tort Law

Tort law, in common law jurisdictions, is a civil wrong that one commits towards another which results in legal liability regardless of a contractual relationship. A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. So, for example, if a restaurant serves their customer expired food, they can face legal liability since they have a **"duty of care"** to all those who consume food on their premises. This can be seen by the very famous case of **"Donoghue v Stevenson (1932)"**, a case which harks back to before World War II.

The seminal case laid the basic foundations for negligence law all thanks to a dead slug in a ginger beer bottle. Two friends met up for drinks at a café when Ms Donoghue ordered a ginger beer only to find the offending slug in the drink. She claimed to get abdominal pain and shock from the sight of the slug and was awarded £500 in damages (a phenomenal sum at the time). The court found that the manufacturer of the beer had a duty of care to all those who consumed his beer.

A body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor.

Since that time a comprehensive body of law has developed which includes road traffic accidents and medical negligence cases. However, in Pakistan (to my knowledge) there isn't a stringent enforcement of Tort law. Every day we hear and see of countless stories of immense medical negligence involving doctors taking out the wrong organ or poisonous alcohol killing several hapless drinkers or even donkey meat being sold by food vendors.

English tort law is the law governing implicit civil responsibilities that people have to one another, as opposed to those responsibilities laid out in contracts.

The current state of Pakistan's judiciary system would need a radical overhaul and this doesn't seem to be something that will happen anytime soon. In the meantime, we can only hope and pray for the day a case like *Donoghue v Stevenson* graces Pakistani courts. However, if tort law does develop in Pakistan along with law of negligence then firms will be compelled to improve the quality of service they provide because of the sword of law hanging above their throats and the eminent threat of levying of huge fines upon them by the court.

The standard judicial classification of negligence is seen in *Blyth v Birmingham Co. (1856)* where Alderson B stated that: "Negligence is the omission to do something

which a reasonable man, guided upon those considerations which regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not.” The only form of negligence code of law performed or at least seen perform in Pakistan is medical negligence.

I believe if these laws are affectively implemented in Pakistan along with laws for corruption and competitiveness we have enough skills, creativity and passion to earn heaps of money that not only Pakistani business world will come out of recession but will thrive so well that in a few years would be able to become a major economic power of the world. The problem I see in us Pakistani's is that we work only if there is a prevalent threat upon our heads otherwise we will be ready to waste double the energy in avoiding doing the same task and indulging in negative activities. The society has a taboo of being morally corrupt, double faced and with deep merged selfishness and greed for worldly wealth.

8. Tax Law in Pakistan

A corporate tax is a levy placed on the profit of a company to raise taxes. After operating earnings is calculated by deducting expenses including the cost of goods sold (COGS) and depreciation from revenues enacted tax rates are applied to generate a legal obligation the business owes the government. Current **corporate rate is 31%**.

The history of modern income taxation for Pakistan dates to 1860. In the Indo-Pak subcontinent earlier taxes were license taxes based on profits, trade and professions. The **Income Tax Act of 1860**, patterned after the United

Kingdom tax, was introduced to meet the deficit which followed the **War of Independence of 1857**. This tax was not permanent and was repealed in 1865. **Income Tax Act of 1886** was a general income tax imposed on traders by some of the provinces beginning in 1878. This was an improvement on earlier. The **Income Tax Act of 1918** and the **Super Tax Act of 1920** were consolidated in the Income Tax Act of 1922. Adopted and followed by Pakistan till 1979. In June 1979, **General Mohammad Zia-ul-Haq** promulgated Income Tax Ordinance, 1979 with effect from **1st July 1979**, it was repeatedly amended. The present Income Tax law, **Income Tax Ordinance 2001** was promulgated in September 2001 (though made effective from July 1, 2002)

In Pakistan, Federal Government is empowered to levy and collect tax on the income of a person from all sources except agriculture. The Countries with the best tax-to-GDP ratios are Denmark 50 percent, Sweden 49.7 percent, Zimbabwe 49.3 percent, Belgium 46.8 percent, and France 46.1 percent. Like many developing countries taxation in Pakistan also creates a major part of government income. In Pakistan 70 types of taxes are levied that are divided into two broad categories i.e. direct taxes and indirect taxes.

Although Pakistan has adopted best practices of the World through Income Tax Ordinance 2001 and formulation of Inland Revenue Services after harmonizing Inland Federal taxes. However, it is suffering from structural weaknesses including narrow tax base, low compliance, widespread exemptions, low coverage and weak audit and enforcement which are responsible for such low tax to GDP ratio.

Countries with high tax to GDP ratios follow a policy with focus on progressive taxes (taxation at rates which rise with income) so far as it corrects income inequality and

precludes enduring differences in society. But in Pakistan whole emphasis is on Indirect taxes. Even direct taxes are being collected in shape of indirect taxes. In Pakistan progressive taxes like wealth tax and capital value tax on transfer of expensive immovable property, has the potential of not less than 400 billion. But unfortunately Wealth tax was abolished in 2003 on extreme pressure of certain influential elements. The dilemma in this country is that the rich and mighty in this country, are not ready to pay wealth tax/income tax on their colossal wealth and income. In this situation, government is constrained to pounce upon the poor with regressive taxes – sales tax and presumptive taxes under the income tax code.

In **Income Tax Ordinance 2001**, Tax deductions are available for the reduction in taxable income for expenses incurred particularly to generate additional income. It reduces the amount of taxable income hence the amount of tax owed to the government is reduced as well. The deductions are available under various heads of incomes such as income from business, property, capital gains, salary and other sources. The deductions, available under income from business, are discussed in the different sections of Income Tax Ordinance.

The **section 20** of the **Income Tax Ordinance 2001** highlights the general deductions available such as deductions allowed for any expenditure incurred by the person in the year wholly and exclusively for the purpose of carrying business. Moreover, allowance is that if the expenditure incurred is used for acquiring a depreciable asset then depreciation must be charged on it accordingly. If expenditure is incurred by an incorporated company on services related to the completion of incorporation, then

tax deductions will be allowed. Expenses not exceeding ten thousand are exempted from tax to be imposed on them.

Section 21 talks about, the deductions that are not allowed according to the law, these include personal expenditures, entertainment expenditures any kind of fines and penalties that are to be paid. Other several subsections come under this section which describes about the deductions not allowed.

Section 22 to 31, describes the special deductions available under this head, initially **section 22** highlights the deductions available on depreciation charge if the depreciated assets is used in generating income for the business, **section 23** talks about initial allowances on depreciated asset available to the person who brings the asset in Pakistan and uses for the first time. **Section 24**, describes amortization of intangibles, acquisition of patents, copyrights and many more things of this nature. **Section 25** brings in pre-commencement expenditure i.e. Deductions that will be allowed for any pre-commencement expenditure for the business made before the commencement of the business.

Section 26 then talks about deductions regarding scientific inventions and research expenditures incurred for the purpose of generating income/profit. **Section 27** highlights employees training and facilities provided to them and deductions related to them such as education and healthcare. **Section 28** talks about deductions for profits on debt, financial cost and lease payments. **Section 29** talks about bad debts and deductible expenses. **Section 30** positions that a banking company or development finance institution or NBFC or modaraba shall be allowed a deduction for any profit accruing on a non-performing debt. Lastly, **Section 31** states that a company shall be allowed a

deduction for a tax year for any amount transferred by the company.

The deductions available must fulfil the conditions laid in the ordinance and the above-discussed sections. To find out how you can maximize your deductions, it is best to talk to a tax professional, such as a tax preparer or lawyer. It is their job to know about tax deductions, and they can guide you to use deductions efficiently and legally. The earlier in the year you learn about possible deductions, the easier it will be to take advantage of them. While computing taxable income from business distinction between 'business', 'profession' and 'vocation' do not have any material significance.

A number of factors partially explain the narrow corporate tax base in Pakistan. These include: High corporate tax rate which leads to the main problem which is Tax evasion. It often entails taxpayers deliberately misrepresenting the true state of their affairs to the tax authorities to reduce their tax liability and includes dishonest tax reporting, such as declaring less income, profits or gains than the amounts actually earned, or overstating deductions. The level of evasion depends on a number of factors, including the amount of money a corporation earns. Efforts to evade income tax decline when the amounts involved are lower. The level of evasion also depends on the efficiency of the tax administration.

One main reason why people avoid paying taxes in Pakistan is the fact that the ruling class does not pay its due share of taxes to the exchequer. The majority of politicians who are sitting in Pakistan's national and provincial assemblies practice tax evasion. Because of poor system of documentation, it is easy for companies to avoid taxes. Widespread tax exemptions by law: The Tax Authorities

allow tax exemptions to companies due to the law. For example, the law allows tax adjustments where the companies can pay taxes for current year in the following years in instalments.

Weak endorsement amid high levels of corruption in the tax machinery and political interference: There is wide spread corruption in tax collecting authorities in Pakistan. The main reason for this is political interference. The big gamers are mostly sitting in parliament and can easily practice tax evasion. The split assignment in the constitution of tax bases between the federal and provincial governments.

Pakistan's fiscal resource base is locked up in low revenue-less spending lower human development and lower GDP growth. Social accountability mechanism is weak and people are not demanding equal access to better public services: Everyone is not paying taxes which leads to emotional problem of avoiding tax as others also start avoiding tax.

According to the IMF report, although the number of people paying personal income tax has increased from roughly more than 750,000 in 2000 to over 3.6 million in 2014, it is quite small to 56.5 million people employed in the country. The salaried taxpayers, who numbered 410,000, contributed about 7 percent of the total revenue. There is widespread disaffection with the functioning of the income tax department and its performance. There are several factors that have resulted in this state of affairs. Some of these are rooted in the income tax legislation, others are an outcome of the constitutional structure of the country, yet others are the result of a complex web lobbying and political compromises, and still others are dictated by the revenue crunch that is faced by the country.

Tax-to-GDP ratio can be defined as total government tax collection divided by the country's GDP. The lacklustre performance in mobilizing tax revenue is a result of a labyrinth of interconnected factors. Narrow tax bases, the extensive use of tax concessions and exemptions, weaknesses in revenue administration, and low taxpayer compliance through informal economic activity and underreporting of formal income result in substantial loss of revenue relative to potential.

The undocumented economy has been the major cause of low tax to GDP ratio. FBR has tried its best to get this major chunk of the informal economy into registration but even then the informal sector has been successful in escaping the documentation, for example when VAT mode was introduced to collect tax at each stage of supply chain so that every person involved in transaction should be registered, they started practice of fake and flying invoices.

The Economic Survey 2015/2016 released said that over the years, various structural problems including narrow tax base, tax administrative weaknesses resulted in a low tax to GDP ratio. While the **"tax revenue-to-GDP ratio has increased by 1.5 percent over the past three years to 11 percent in 2015"**, it remains significantly below comparator emerging market economies and the tax effort expected for the country's level of development. Pakistan is developing a tax system to protect the common interests of taxpayers and generate ample government revenue for the provision of public goods has always remained a challenging task.

Despite a significant increase in revenue collection *(in the absolute tax to GDP ratio varied between 9.1 and 11.0 percent)*. **"Particularly, FBR tax to GDP ratio remained within the narrow band despite a significant increase in absolute term,"** the review said. Measurement of narrow

tax base is important because the mobilization of tax revenue has a direct nexus with the number of taxpayers participating actively in the system set up to levy and collect taxes. In the case of Income Tax, the number of persons filing periodic '**Returns**' vicelike the total population of the country, is a key indicator of the 'Tax Base' for the direct taxation of income earned by individuals and other entities including corporate entities recognized as '**persons**.' The findings presented in this paper suggest that a concerted agenda of well-designed federal and provincial policy adjustments and institutional reforms—aimed at expanding tax bases, reducing tax concessions and exemptions, addressing structural weaknesses in fragmented tax administrations, and improving tax compliance across all sectors of the economy—will not only boost revenue mobilization, but also improve the perceived fairness of the tax system in Pakistan.

One of the major problems in Pakistan which also hinders the smooth audit and examination procedure is the lack of documentation particularly in the case of individuals and also pertains to the firms and small corporations. It implies that an incomplete and inaccurate data is provided by the taxpayer with poor record keeping. Although detailed working and procedures have been identified in the **National Audit Manual** to reform the audit system of **Federal Board of Revenue**, but it requires implementation in its true spirit to yield the desired results.

This year only **18,098** corporate entities filed their income tax returns as against total registered taxpayers i.e. **44,794 companies**, so a deficit of more than **60 %** exists. Even filing of corporate returns remained short by **13.8 %** as more than 21,000 corporate entities filed tax returns during the same period last year, indicating a weak enforcement

of law. The FBR has still not developed a required data base for analysis. There are many companies, which do not file return while they are active on the record of **Securities and Exchange Commission of Pakistan (SECP)**. So there are still some important institutions whose data is not available for cross matching with the figures provided by the taxpayers.

The historical development of tax ratios confirms underperformance in revenue mobilization, with **the tax-to-GDP ratio (2016) currently 1.4 percentage points below its peak of 12.4 percent of GDP in 1996**. Pakistan has the potential to mobilize additional tax revenues by an amount as much as, if not more than, it currently collects: its tax capacity is estimated to be **22.3 percent of GDP**, which implies a tax revenue gap of more than 11 percent of GDP. It said that review of Pakistan's tax structure revealed that the tax system is highly dependent on indirect taxes.

Tax buoyancy is a useful concept, but it does not help identify whether the tax system is efficiency and, more importantly, whether the degree of efficiency is improving over time.

The revenue efficiency of the GST showed an improvement from an average of 0.11 in the 1990s to the peak of 0.27 in 2003, but it declined to an average of 0.23 over the past three years. The rise in GST efficiency, however, was a result of the agreement between the provinces and the FBR to collect GST on their behalf. Furthermore, the GST efficiency in Pakistan is still significantly below the unweighted average of 0.28 in Africa and 0.44 in Asia Pacific. Pakistan's relatively low GST efficiency partly reflects the recent increase in GST exemptions (from 0.1 percent of GDP in 2012 to 0.8 percent in 2015) and a limited progress in bringing retailers into the tax base.

On the other hand, the productivity rates of the CIT and PIT regimes show a sustained improvement over the past decade with greater use of withholding taxes.

Although trade liberalization and tariff rationalization have lowered revenues related to foreign trade, indirect tax collections continue to account for about 63 percent of total tax revenue at the federal level. The share of direct taxes, on the other hand, has increased from an average of 18.5 percent in the first half of the 1990s to 29 percent in 2000 and about 37 percent in recent years.

Cross-country figures indicate that there is also a strong relationship between the tax revenue-to-GDP ratio and business climate and corruption. To improve taxpayer compliance and curb tax avoidance and evasion, reform efforts must aim to modernize and bolster the effectiveness of tax administrations at federal and provincial levels by reorganizing along functional lines, integrating databases and information technology, and requiring a tax identity number in all financial and immovable property transactions. This would also help deal with the potential problem of using remittance transfers as a mean of tax evasion. The tax revenue-to-GDP ratio has rebounded in recent years still significantly below comparator developing countries and Pakistan's own tax potential. This reflects a plethora of factors including narrow tax bases, overgenerous tax concessions and exemptions, weak and fragmented revenue administrations, and structural features of the economy.

Unfortunately, the country is being run on the financial oxygen being provided by international donor's agencies. Government borrowing from State Bank of Pakistan has reached astronomical figures.

The situation of Pakistan is further complicated by intergovernmental fragmentation in revenue administration. According to the constitution, provincial governments are responsible for taxation of agriculture, services and immovable property, which represent a significant share of economic activity and thereby a substantial pool of potential tax revenues.

The government plans to increase the tax revenue-to-GDP ratio to 14.5 percent by 2020 to strengthen debt sustainability and resilience to fiscal shocks, and finance the country's development needs. To this end, the Ministry of Finance established a high-level tax reform commission, and the Federal Board of Revenue (FBR) has implemented a series of reforms aimed at broadening the tax base and improving taxpayer compliance.

Pakistan gravely lacks in tax culture, rather it comes as an alien concept. The real dilemma of country is that rich as well as poor both are not willing to pay the taxes on the ground of overall insecurity and lack of basic necessities. Government is of the view that in absence of revenue, demands of the public cannot be fulfilled thoroughly.

It is unfortunate that the Government has failed to persuade the feudal class to give taxes but on the other hand the poor salaried individuals are the victim of withholding tax regime. Besides this inequality there are many loopholes in the prevailing tax system by which rich class manage to evade taxes but poor is forced to bear the brunt of taxes.

Tax exemptions/subsidies are also by and large given to the class that has the ability to pay the taxes. Besides inequality the biggest problem remains social as

people do not feel it as their duty to pay taxes yet they demand services.

Tax to GDP ratio can be enhanced only when all sectors of economy contribute proportionately toward tax revenue. Empirical analysis of taxes has explored negative effects of taxes in economy of Pakistan. Both consumption and investment, that are considered major economic activities, showed negative response against taxes, as a result, overall effects of tax on GDP are also negative.

In Pakistan, an arguably perverse view of this American proclamation has been in vogue for some time now: “No taxation with representation”, which means that rich Pakistanis, including a significant percentage of members of the National Assembly and provincial legislatures pay next to nothing in tax, forcing the government to rely on foreign assistance to prop up finances. In the past, US Secretary of State Hillary Clinton said that Pakistan must tax its elite if it wants to continue receiving financial assistance and for this she came in for some heavy criticism in Pakistan. Pakistan's rich have historically paid little of their share in taxes. The average worth of a member of parliament is \$900,000, with the richest member worth over \$37 million, according to a recent study by the Pakistan Institute of Legislative Development and Transparency.

Government does not address one important source of tax leakage, namely ‘flight of capital’. If tax that is evaded are reinvested back in the form of domestic assets, it is easily detected through surveys. Tax evaders would start investing in foreign assets. For example, a tremendous out-flow of capital including legally earned profits, is already taking place in Pakistan i.e. The Panama Leaks.

The extent of this leakage may already be significant and could gain momentum if local avenues of evading taxes are effectively plugged. This is a strong case for detecting evasion primarily through effective tax audit and supplementing it with regular surveys to identify non-filers and cases of under-declaration and false declaration. If tax evasion is detected at the audit stage, then it can be caught before it finds its way out of the country.

Exempting agriculture from taxation imposes a heavy burden on the rest of the economy and is one of the main reasons why there is usually a deficit between what the government collects in tax revenue and what it wants to spend in a budgeting year. Government cannot seem to broaden the tax base by including agriculture in the tax net, the other option is to rely on indirect taxes.

The problem with these are that they disproportionately affect the poor and less well-off, since they spend more on items like fuel and food as a percentage of income than more affluent people. This in turn further skews an already unequal distribution of income, and gives rise to arguments that instead of taxing the rich, the government is making life tougher for a section of the population that already lives a miserable existence.

A good tax system requires a good tax policy but more importantly, an administrative system that can put these policies into practice. Tax reform efforts in the past have concentrated primarily on issues of policy; the issue of improvement of tax administration and of processes has not been given the importance it deserved

Property sector in Pakistan is one of the biggest revenue generating sector in Pakistan with an estimated net worth of more than 6000 billion rupees according to the

finance minister of Pakistan. This sector was taxed nominal over the past few decades. The nature of business in the real estate sector is very different from other high earning areas of the economy in real estate there is an ease of investing and high returns can be generated by on part time basis as well. This unique feature of real estate has attracted a lot of investment over the past few decades. People with white money and black money have contributed a lot and earned more than any industry ever in the history of this country.

Finance minister Ishaq Dar for the time tried to regulate this sector. Real estate sector was a safe haven for people with black money. What they actually did was that this black money was used to a property at Deputy Commissioner Rate which was approximately around 10% of fair market price rate. The remaining amount was given to the seller in cash, unaccounted and not taxed. After sometime the owner of the property has to find a legal buyer who is willing to purchase the property at fair market value after giving the taxes. The property owner will sell the property and will convert their black money into white money. This whole scheme led to multiple attacks on the national revenue generation procedure, illegal money was turned into legal money and tax was given at the lowest property rates.

Now government has taken step to overcome this problem but these step are still inadequate to overcome the 10.5% tax to GDP ratio of Pakistan. Now all these steps have created a more complex system according to some property experts. Now there are three rates prevailing in the market, FBR rate at which government collects taxes, a business rate at which original transaction is done and a Dc rate at which stamp duty of these properties are collected.

This main issue government is facing is due to the lack of coordination between the federal and the provincial governments who collect the stamp duty on DC rates. The rates set by the FBR are still subjected to criticism because experts believe that there is still a minimum difference of 10million rupees between the FBR rates and the fair market value.

A **wealth tax** (also called a capital tax, equity tax, or net worth tax) is a levy on the total value of personal assets, including owner-occupied housing; cash, bank deposits, money funds, and savings in insurance and pension plans; investment in real estate and unincorporated businesses; and corporate stock, financial securities, and personal trusts. Typically, liabilities (primarily mortgages and other loans) are deducted, hence it is sometimes called a net wealth tax.

A wealth tax taxes the accumulated stock of purchasing power, in contrast to income tax, which is a tax on the flow of assets (a change in stock)

In Pakistan it was introduced by **Wealth Tax Act, 1963 ACT NO. XV OF 1963**. There is no wealth tax at the moment but you have to submit wealth statement every year together with income statement. And the wealth showed in wealth statement shall match with your income statement. That is called white money transaction in Pakistan. Individuals, including members of Association of Persons or directors of companies, whose last declared or assessed income or declared income for the current tax year is equal to or more than Rs 1,000,000 or the final tax paid is equal to or more than PKR 0, must file Wealth Statement. We are required to file wealth statement defined under **Section 116 of Income Tax Ordinance, 2001**.

The abolishing of wealth tax has shifted burden of tax from upper class to lower classes of the society. Here is a big example of Riaz Malik the billionaire & business tycoon has some asked him that does he pay Taxes or how much is he paying taxes according to the wealth and properties he owned. Before its abolition in 2003, the wealth tax was the only progressive tax available with tremendous potential for growth, if exemptions given to the rich absentee landlords were scrapped. This became obvious immediately after its repeal when billions of rupees (estimated at \$60 billion) started pouring in from all over the world, remitted by all and sundry, without any fear of being investigated, courtesy amnesty given under [Sec 111\(4\) of the Income Tax Ordinance, 2001](#). With no wealth tax to pay, both these avenues helped to increase individual wealth but dreadfully stripped the entire nation of its right to enjoy economic prosperity. From 2003 to date, according to a conservative estimate, Rs200--350 billion worth of wealth tax have been lost.

In today's environment it is crucial for the FBR to conduct strong audits in order to ensure that the tax returns filed by the taxpayers on self – assessment basis are accurate and complete and these returns do not in any way understate the income of the taxpayer. In order to facilitate the taxpayers a new scheme was introduced in the income tax ordinance called the [Universal Self-Assessment Scheme \(USAS\)](#). The scheme was that the taxpayer had to assess their income and file it honestly. This scheme basically was introduced to minimize the contact between the tax payers and the tax collector. Also the tax collector could not assess the income tax filed by the taxpayer, hence slashing the power of audit. The results of such scheme were catastrophic, the documentation and increase in revenue which started to take place in the nineties, faded away with

this scheme. That is why strong audits are extremely necessary for the negative aspects of USAS to be eradicated.

The main issue with our tax regime is that it is pro-elite and every tax which was progressive in nature has either been abolished or has been neutralized to its limits. In the last two years alone, revenue loss on account of taxing income from property at reduced rate is estimated at Rs280 billion. The state does not need any borrowing at all, if the rich and the mighty are taxed according to the established democratic norms of equity.

“The dire need is to tap the real tax potential and make the economy self-reliant, stop wasteful, unproductive expenses, cut the size of cabinet and government machinery, make government-owned corporations profitable, accelerate industrialisation and increase productivity, improve agriculture sector, bring inflation to single digit and reduce inequalities through a policy of redistribution of income and wealth.”

(Tax reforms strategy, 2010)

“Before the abolition of wealth tax in 2002 it was charged at a rate of 2.5 per cent. At the same time, it was decided that assets which were liable to wealth tax should not be included in the Zakat payable list.

The best example is the real estate. After the abolition of wealth tax, the assets should either be included in the Zakat payable list or wealth tax should be reintroduced. The official said that

Reintroduction of the tax would at least help the tax department unearth the hidden wealth of rich people. This will help us to broaden our tax base.”

(Introduction of wealth tax under consideration, 2011)

9. Cyber Laws in Pakistan

Cybercrime is an act in which computers or networks are a tool, a target, or a place of criminal activity. Cybercrime is also stated as any use of a computer as an instrument to further illegal ends, such as committing fraud, stealing identities and violating privacy.

It also includes traditional crimes in which computers or networks are used to enable the illicit activity. As the computer has become central to commerce, entertainment, and government. Cybercrime has grown in importance. Cyber laws are an attempt to apply laws designed for the physical world to human activity on the Internet.

There are different laws, promulgated in Pakistan. These laws not only deal with crime of Internet. These deal with all dimensions related to computer & networks. Two of them are most known. The three prominent cybercrime enactments are:

- Electronic Transaction Ordinance (ETO) 2002
- Electronic / Cyber Crime Bill 2007
- Prevention of Electronic Crimes Act (PECA) 2016

Electronic Transaction Ordinance 2002

The Electronic Transactions Ordinance (ETO), 2002, was the first IT-relevant legislation created by national lawmakers. A first step and a solid foundation for legal sanctity and protection for Pakistani e-Commerce locally and globally. The ordinance laid the foundation for comprehensive Legal Infrastructure. It is heavily taken from foreign law related to cybercrime.

Before ETO there was no recognition of electronic documentation, electronic records, and evidential basis of documents/records. There was Failure to authenticate or identify digital or electronic signatures or forms of authentication. No online transaction could be legally binding. Electronic Data & Forensic Evidence were not covered by any rules.

ETO introduced Electronic Documentation & Records recognized, Electronic & Digital forms of authentication & identification given legal sanctity and Messages through email, fax, mobile phones, Plastic Cards, were recognized.

Sections of ETO 2002

There are 43 sections in this ordinance. It deals with following 8 main areas relating to e-Commerce.

1. Recognition of Electronic Documents
2. Electronic Communications
3. Digital Signature regime and its evidential consequences
4. Web Site & Digital Signatures Certification Providers
5. Stamp Duty
6. Attestation, notarization, certified copies
7. Jurisdiction
8. Offences

Important Sections of the act are:

→ Sec 36. Violation of privacy information

- gains or attempts to gain access
- to any information system with or without intent
- to acquire the information
- Gain Knowledge

- Imprisonment 7 years
- Fine Rs. 1 million
- **Sec 37. Damage to information system, etc.**
 - alter, modify, delete, remove, generate, transmit or store information
 - to impair the operation of,
 - or prevent or hinder access to, information
 - knowingly not authorized
 - Imprisonment 7 years
 - Fine Rs. 1 million
- **Sec 38. Offences to be non-bail able, compoundable and cognizable**
 - All offences under this Ordinance shall be non-bail able, compoundable and cognizable.
- **Sec 39. Prosecution and trial of offences.**
 - No Court inferior to the Court of Sessions shall try any offence under this Ordinance.

Electronic/Cyber Crime Bill 2007

Prevention of Electronic Crimes Ordinance, 2007 was promulgated by the President of Pakistan on the 31st December 2007 and approved by federal cabinet on 17th January 2007. The Prevention of Electronic Crime Ordinance (PECO) 2007 was presented in the National Assembly under article 89(2) of the Constitution. The bill deals with the electronic crimes included:

- Cyber terrorism
- Data damage
- Electronic fraud
- Electronic forgery
- Unauthorized access to code
- Cyber stalking
- Cyber Spamming/spoofing

It offers penalties ranging from six months' imprisonment to capital punishment for 17 types of cybercrimes. It will apply to every person who commits an offence, irrespective of his nationality or citizenship. It gives exclusive powers to the Federal Investigation Agency (FIA) to investigate and charge cases against such crimes. The bill suggests maximum punishment of death or life imprisonment for those booked under cybercrimes or involved in sensitive electronic systems offences. The Minister for Information Technology Awais Ahmad Khan Leghari stated for the bill: *"the e-crime law would require the internet companies maintain their traffic data for at least six months to enable the agencies to investigate cases involving data stored by them."* He said the law would enable the government to seek extradition of foreign nationals through Interpol for their involvement in criminal activities punishable under the law.

Prevention of Electronic Crimes Act (PECA) 2016

National Assembly enacted the PECA to provide a comprehensive legal framework to define various kinds of electronic crimes, mechanisms for investigation, prosecution and adjudication in relation to electronic crimes. Supports Cyber Crime Bill 2007. The legislation established new offences including

- illegal access of data (hacking)
- DOS and DDOS attacks
- electronic forgery and electronic fraud
- cyber terrorism

The legislation provides new investigative powers which were unavailable before such as search and seizure

of digital forensic evidence using technological means, production orders for electronic evidence, electronic evidence preservation order, partial disclosure of traffic data, and real time collection of data under certain circumstances and other enabling power which are necessary to effectively investigate cybercrime cases. On April 13, 2016 the National Assembly's Standing Committee on Information Technology and Telecommunication approved the Prevention of Electronic Crimes Bill (PECB).

→ **Salient features of the bill are:**

1. Up to three years' imprisonment, Rs1 million fine or both for unauthorised access to critical infrastructure information system or data
2. The government may cooperate with any foreign government, foreign or international agency, organisation or 24x7 network for investigation or proceedings relating to an offence or for collecting evidence
3. The government may forward any information to any foreign government, 24x7 network, foreign or international agency or organisation any information obtained from its own investigation if the disclosure assists their investigations

4. Up to seven years, Rs10 million fine or both for interference with critical infrastructure information system or data with dishonest intention
5. Up to seven years, Rs10 million fine or both for glorification of an offence relating to terrorism, any person convicted of a crime relating to terrorism or proscribed individuals or groups. Glorification is explained as “depiction of any form of praise or celebration in a desirable manner”
6. Up to six months’ imprisonment, Rs50 thousand or both for producing, making, generating, adapting, exporting, supplying, offering to supply or importing a device for use in an offence
7. Up to three years’ imprisonment, Rs5 million fine or both for obtaining, selling, possessing, transmitting or using another person’s identity information without authorisation
8. If your identity information is used without authorisation, you may apply to the authorities to secure, destroy or prevent transmission of your information

In its present form PECB will criminalise conduct that shouldn't be criminalised, equip investigation agencies and PTA with overbroad and unguided powers that will be susceptible to abuse, and chill free speech without any corresponding augmentation of the right to privacy or dignity.

Punishments for Cyber Crime under Judicial Precedence currently are:

Under law there are defined punishment for the offence. Every respective offence has its distinctive punishment which can be imprisonment or fine.

- **Data Damage:**

Whoever with intent to illegal gain or cause harm to the public or any person, damages any data, shall come under this section. **Punishment** 3 years' imprisonment and Maximum damages of Rs. 3 lac rupees

- **Electronic fraud:**

People for illegal gain get in the way or use any data, electronic system or device or with intent to deceive any person, which act or omissions is likely to cause damage or harm. **Punishment** 7 years' imprisonment and Maximum damages of Rs. 7 Lac.

- **Electronic Forgery:**

Whoever for unlawful gain interferes with data, electronic system or device, with intent to cause harm or to commit fraud by any input, alteration, or suppression of data, resulting in unauthentic data that it be considered or acted upon for legal purposes as if it were authentic, regardless of the fact that the data is directly readable and intelligible or not. **Punishment** 7 years' imprisonment and Maximum damages of Rs. 7 Lac

- **Malicious code:**

Whoever wilfully writes, offers, makes available, distributes or transmits malicious code through an electronic system or device, with intent to cause harm to any electronic system or resulting in the theft or loss of data commits the offence of malicious code. **Punishment** 5 years' imprisonment and Maximum damages of Rs. 5 Lac

- **Cyber stalking:**

Whoever with intent to harass any person uses computer, computer network, internet, or any other similar means of communication to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, picture or image? Make any suggestion or proposal of an obscene nature. Threaten any illegal or immoral act, take or distribute pictures or photographs of any person without his consent or knowledge commits the offence of cyber stalking. **Punishment** 3 Years of imprisonment and Maximum damages of Rs. 3 Lac

- **Spamming:**

Whoever transmits harmful, fraudulent, misleading, illegal or unsolicited electronic messages in bulk to any person without the express permission of the recipient, involves in falsified online user account registration or falsified domain name registration for commercial purpose commits the offence of spamming. **Punishment:** 6 months of imprisonment and Maximum damages of Rs. 50,000

- **Spoofing:**

Whoever establishes a website, or sends an electronic message with a counterfeit source intended to be believed by the recipient or visitor or its electronic system to be an authentic source with intent to gain

unauthorized access or obtain valuable information. Later, Information can be used for any lawful purposes commits the offence of spoofing. **Punishment:** 3 Years of imprisonment and Maximum damages of 3 Lac

- **Cyber terrorism:**

Any person, group or organization who, with terroristic intent utilizes, accesses or causes to be accessed a computer or computer network or electronic system or device or by any available means, knowingly engages in or attempts to engage in a terroristic act commits the offence of cyber terrorism. **Punishment:** Whoever commits the offence of cyber terrorism and causes death of any person shall be punished with death or imprisonment for life, and with fine. Otherwise he shall be punishable with imprisonment of ten years or with fine ten million rupees

10. Conclusion

English legal system has a deep rooting in Pakistan's legal system since it lays down the principles of administering justice. And gives guidelines and concepts including writs like, habeas corpus, mandamus, prohibition, quo warranto, certiorari and ex post facto (no one should be punished for a crime not previously defined in law).

In Pakistan, neither judiciary nor parliament has evolved as such to cater socio-economic justice and rightful conditions due to continuous interventions of military coups and autocratic administrative patterns. Interestingly the latter two are usually justified through Dicey's perspective of 'executive prerogative' and 'doctrine of state necessity' which he had evolved in British model as a last resort to protect realm against any unusual perils.

“Notions like constitutional validity and constitutional supremacy is alien to the classic positivist jurisprudence as prevail in the Indo-Pak legal corpus. (Tariq, 2016)”

Much of chaos in our legislative system is also because of our shift in imperialism from British to Islamicization to American jurisprudence.

“As fallout of an incompatibility between English and American jurisprudential traditions an administrative penology under the auspicious of colonial administrative patterns prevails in Pakistan. (Tariq, 2016)”

In Pakistan the practiced constitution and legal system is basically an evolution of English Legal System which retaining its true spirit of incorporating the norms of the locals has evolved quite distinctly from the evolution course it has taken in its native land (England) hence now after almost seventy years it seems as if the law practiced in United Kingdom is separate from the law practiced in Pakistan. However, the traces of evolution in the corridors of time show that both the laws belong to the same ancestor but have varied due to adaptation with the local environment quite similarly as to how an organism might evolve biologically over time when it migrates to two almost opposite places.

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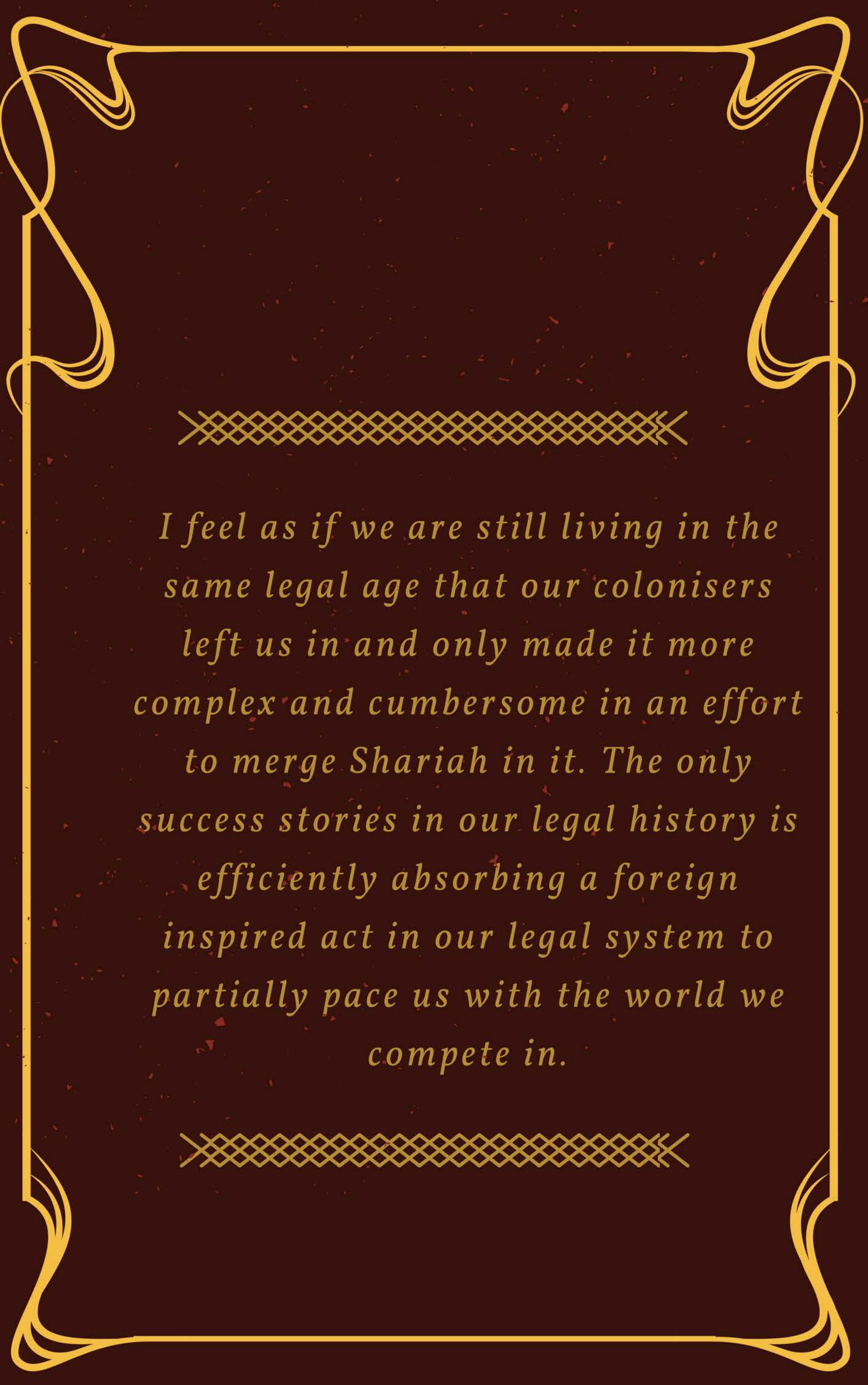
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I feel as if we are still living in the same legal age that our colonisers left us in and only made it more complex and cumbersome in an effort to merge Shariah in it. The only success stories in our legal history is efficiently absorbing a foreign inspired act in our legal system to partially pace us with the world we compete in.

